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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 885

CHARLES E. WILLIAMS, *Petitioner*,

v.

HOT SHOPPES, INC., *Respondent*.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF THE PETITIONER

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I.

THE COURT HAS JURISDICTION TO REVIEW THIS CASE

Respondent's argument to the jurisdiction of the Court is erroneous.

The original complaint was based on the requirement of racial segregation in restaurants by the Virginia segregation statute. The opinion and judgment of the court below, entered April 20, 1961, recited affirmance of the dismissal of the claim under the Civil Rights Act of 1875, and remanded the complaint for

further proceedings in order to determine its sufficiency under the Civil Rights Act of 1871, 42 U.S.C. § 1983.

On remand, the original complaint was dismissed with leave to file the pending amended complaint to be based on the enforcement of racial segregation in restaurants by state officers.[1] It was at this point that * * * "the lower court change[d] matters of substance" * * * in the case, and the period within which a petition for certiorari could be filed would then * * * "begin to run anew" * * * upon the rendering of a judgment on the amended complaint. See *F.T.C.* v. *Minne-*

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[1] In view of respondent's statement (BR-4, fn) the Order of the District Court granting leave to amend the complaint is fully set forth:

"This cause came on to be heard on motion of plaintiff for leave to amend the complaint, and it appearing to the Court that the complaint properly may be amended to set forth facts showing enforcement of racial segregation in defendant's restaurant by state administrative or executive officers, it is

"ORDERED, that plaintiff's motion for leave to amend the complaint be, and the same is hereby, granted; and it is further

"ORDERED, that the plaintiff shall so amend the complaint as to eliminate any reference whatsoever to Va. Code sec. 18-327 or other state statute, and that the amended complaint shall set forth facts as will constitute a statement of a single cause of action for the alleged discrimination in the defendant's restaurant based upon the enforcement of racial segregation by state administrative or executive officers; and it is further

"ORDERED, that the cause of action alleged in the sixth and seventh paragraphs of the original complaint be, and the same is, hereby dismissed with prejudice.

/s/ "LUTHER W. YOUNGDAHL
"United States District Judge

"Dated: June 5th, 1961."

apolis-Honeywell Regulator Co., 344 U.S. 206, 211-212. Respondent's argument misses the point because it erroneously treats the original complaint as two separate claims, when, as a matter of fact, it constituted a single claim which stated two grounds for recovery. The same is true of the amended pleading.

Again, contrary to respondent's contention, the judgment of April 20, 1961, is not *res judicata* of the pending claim under the Civil Rights Act of 1875. Technically, there was nothing of substance concerning the 1875 statute, in that judgment, to review by certiorari. If the court below could not say that a deprivation of the federal right (to be free from state-sanctioned discrimination) had been sufficiently alleged under 42 U.S.C. § 1983, then it had no occasion to determine the validity of the claim under the Civil Rights Act of 1875.

Therefore, the opinion rendered on the validity of the 1875 statute was based on assumed facts and constituted a dictum on an abstract, contingent and speculative question not properly before the court on the record. Such a decision can not be *res judicata* of a subsequent pleading which does sufficiently allege a cause of action based on discriminatory state action.

Clearly, the pending amended complaint is not "identical" with the original complaint, which, for all intents and purposes, is no longer a part of the pleadings in this controversy. See note 1, *supra*. The pending amended complaint has been held legally sufficient to state a cause of action (based on state action) under the Civil Rights Act of 1871.

Hence, the question of whether the Civil Rights Act of 1875 applies to state action in publicly-created,

licensed and regulated restaurants was squarely presented for the first time in this controversy by the pending amended complaint. And a determination of that question is not foreclosed by the prior opinion and judgment. See pp. 6-8 of the Petition.

Consequently, it is the judgment of November 17, 1961, upon which a timely petition for rehearing was denied on March 12, 1962, which is now sought to be reviewed.

II.

THE ORDER OF THE DISTRICT COURT IN THIS ACTION WAS FINAL AND APPEALABLE

Contrary to respondent's argument, the appealability of the order depends upon its substance and effect, not its designation. The order of the District Court in this case, while it denied a motion for summary judgment, constituted a judgment upon pleas in bar of the action. As such, it deprived petitioner of a substantial remedy, and, most decidedly, denied respondent of substantial defenses. Hence, the judgment is as final and conclusive as one rendered upon proof. *Northern Pacific Ry. Co.* v. *Slaght*, 205 U.S. 122, 130.

III.

THIS ACTION IS NOT A MULTIPLE CLAIM SUIT WITHIN RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The pending claim is a single claim arising out of a single occurrence on November 5, 1959, which states two grounds for relief under the civil rights acts. "The Rules make it clear that it is 'differing occurrences or transactions which form the basis of separate units of judicial action.'" *Reeves* v. *Beardall*, 316 U.S. 283, 285. The 1946 amendment of Rule 54(b) did not

change this principle. *Creel* v. *Creel*, 87 U.S. App. D.C. 79, 82, 184 F. 2d 449, 452.

Furthermore, the District Court was not called upon to, nor did it, adjudicate any "claim for relief * * * presented," within the meaning of Rule 54(b). The only questions before the court on the motion for summary judgment were the legal sufficiency of the complaint and whether the respondent was a proper party to the action. Rule 54(b) does not apply to such determinations. *Youpe* v. *Moses*, 94 U.S. App. D.C. 21, 26-27, 213 F. 2d 613, 619.

IV.

THE LEGISLATIVE MATERIALS AND OTHER EXTRINSIC EVIDENCE TEND TO SHOW THAT THE CIVIL RIGHTS ACT OF 1875 HAS PRESENT VALIDITY

The respondent fails to meet the argument for the constitutionality of the Act in question, particularly in light of the rules of construction for the validation of statutes. Under them, the 1875 statute is before the Court for the first time to test the application of its remedial sanction to state-sanctioned racial discrimination in public restaurants. The Act is thus supported by the presumption of constitutionality since the prior decisions, which rejected it as invalid, are limited to the precise facts then before the Court. The strictness with which this principle has been applied is illustrated in *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-575.

Since this Court never questions legislative wisdom, it must be presumed that Congress, in enacting the 1875 statute, intended to meet a national need by harmonizing, within constitutional bounds, a policy of nondiscrimination with the general welfare. Compact

phrasing or inartistic language will not be permitted to distort or nullify that purpose, *United States* v. *Gaskin,* 320 U.S. 527, 528, 529-530, nor the practical value of the legislation as a remedial or corrective measure. The meaning, policy and purpose of the statute can be ascertained by extrinsic aids and previous experience with the Civil Rights Acts of 1866, 1870 and 1871.

The Civil Rights Act of 1875 is a statement of policy addressed to a group of possibilities and to the attainment of a particular end. If read literally, it may appear *ex directo* to punish purely private action in inns, public conveyances and places of public amusement. But the legislative history indicates that the statute was intended to apply to state action[2] in all facilities "licensed by law" which are "kindred to inns or public conveyances" and "undertake to provide for the public under sanction of law,"[3] including "public houses," "taverns," and a "railroad refreshment room."[4]

Contrary to respondent's contention (BR-12, fn 5) the scope of the term "inns" in the Act, for equal protection purposes, is limited neither by the common law definition of an unlicensed inn nor by state law definitions for police purposes, such as, health, morals, bailments, revenue, licensing, liquor control, etc. The gen-

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[2] Mr. Benjamin Butler, Chairman, House Judiciary Committee, explaining the scope of the legislation, CONG. REC., 43rd Cong., 1st Sess., pp. 340-341; Senator Charles Sumner, author of the legislation, explaining that it was supplementary to existing civil rights legislation, CONG. GLOBE, 42nd Cong., 2nd Sess., pp. 381, 383.

[3] Sen. Sumner, *ibid.*

[4] Mr. Butler, CONG. REC., 43rd Cong., 2nd Sess., pp. 940, 1006.

eral history of the times indicate that public houses of all kinds, including victualling and refreshment houses, were included in the statutory conception of inns.[5]

Legislation, generally, seldom attains more than approximate precision. Statutes are instruments of government which partake of practical purposes, infirmities, limitations, awkward and groping efforts. Hence, the actual issue in litigation must be the determinate of their effect. See Max Radin, Statutory Interpretation, 43 HARV. L. REV. 863, 868-869 (1930); Archibald Cox, Judge Learned Hand and the Interpretation of Statutes, 60 HARV. L. REV. 370, 384-390 (1947); Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 528 (1947).

Finally, respondent misconceives the thrust and insights of the petition. The application of the statute called for by the pending complaint would cover, not a fraction, but all of the cases Congress originally intended to cover. The complaint calls for a uniform national application to racial discrimination which is enforced by governmental authority, either directly or indirectly, at all levels, in all jurisdictions, federal and state, throughout the United States.

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[5] See *e.g.*, WILLCOCK, LAWS RELATING TO INNS, HOTELS, ALEHOUSES AND PLACES OF PUBLIC ENTERTAINMENT (London, 1829), p. xiv; Refreshment Houses Act of 1860 and the Innkeepers Liability Act of 1863, 23 & 24 Viet., c. 27, and 26 & 27 Viet., c. 41, respectively; 9 COMP. STAT. ENG. 923, 925 (1929); 17 HALSBURY, LAWS OF ENG. 305 (1905).

V.

IT IS RESPECTFULLY SUGGESTED THAT REVIEW OF THIS CASE COULD POSSIBLY HAVE THE ULTIMATE EFFECT OF EXPEDITING JUDICIAL BUSINESS

The question of whether local segregation, breach of the peace, disorderly conduct and anti-trespass statutes have been violated by persons who sought the accommodations of publicly-licensed and regulated facilities, which are regularly made available to the general public, is presented in scores of so-called "sit-in" cases now pending in a number of state and federal jurisdictions.

It is respectfully suggested that if the Court should ultimately decide that the federal right to be free from state-sanctioned racial disabilities is also secured by the Civil Rights Act of 1875, a number of such cases could be resolved, at least where the convictions rest solely on evidence of the mere peaceable assertion of the federal right. The dockets of the lower courts could be relieved, judicial business could be expedited, and the public interest would thus be served.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petitioner prays the Court to grant the Writ of Certiorari.

Respectfully submitted,

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May 18, 1962